IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Chapter VIII, Rule 32(2)(b)

Description of the case

Writ Petition No.669 of 2001 (S/B)
(Old No. 10891/83)

Date of decision: 11th of February, 2005.

For the Approval of:

Hon'ble Chief Justice V.S.Sirpurkar

Hon'ble Mr. Justice P.C.Pant

-Whether the order/judgment should be sent to the reporters for reporting? (Yes)

-Whether the reporters be allowed to see the judgment? (Yes)

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IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Writ Petition No. 669 (S/B) of 2001

Ramji Singh s/o Sri Sukh Pal Singh ,
R/o Village Gauripur,
Post Office Purbgaon
Head Post Office Gauriganj,
Tehsil Amethi,
District Sultanpur …… Petitioner

Vs.

1. Union of India through the Secretary,
   Ministry of Defence, New Delhi.
2. General Officer Commanding,
   U.P. Area Bareilly.
3. Commanding Officer, Mukhyalaya,
   501, Keshtriya Sarveshan Engineering
   Group, Head Quarters 501,
   Field Survey Engineer Group,
   Dehradun.
4. Judge Advocate General's Branch,
   Army Head Quarter, D.H.O.,
   P.O.New Delhi-110011 …….... Respondents.

…….

Mr. R.Dobhal, learned counsel for the petitioner.
Mrs.Anjali, learned counsel for the respondents.

Coram: Hon. V.S.Sirpurkar, C.J.
Hon. P.C. Pant, J.

Dated: 11.02.2005

[Per Hon'ble Chief Justice]

1. This writ petition is at the instance of an ex-soldier, who joined the Army in the year 1963 in Unit No. 501, Field Survey Engineer Group located at Dehradun.

2. During his service career, he was promoted to the rank of Naik and was further promoted to the rank of Acting Havaldar w.e.f. 10.8.1981. While acting as a Havaldar, there was an accident on 27.03.1982, when he was driving army vehicle in the city of Dehradun, in which one Laxman Singh, Lance Naik, lost his life. The petitioner was, therefore, tried by way of District Court Martial, presumably under section 69 of the Army Act for the civil offence punishable under section 304-A of the Indian

Penal Code. In the Court Martial, he was found guilty and was awarded following sentence by the order dated 14.11.1982:

(a) to be reduced to ranks

(b)to suffer rigorous imprisonment for one month in military custody w.e.f. 14 November, 1982.

Accordingly, it seems that he was taken into custody and started serving out sentence of one month rigorous imprisonment, This sentence was confirmed by the Confirming Authority on 15.12.1982.

3. The verdict of the District Court Martial as also the Confirmation order was challenged by way of petition under section 164 (2) of the army Act. This petition under section 164 (2) of the Army Act, came to be allowed in the sense that the sentence/punishment awarded by the District Court Martial was commuted on the following grounds. For the sake of convenience, we reproduce the whole order dated 02.03.1983. The order runs as under:

"Case No. 180107/666/A1

REMARKS OF THE GENERAL OFFICER COMMANDING UTTAR PRADESH AREA ON THE PETITION UNDER AA SEC 164 (2) SUBMITTED BY NO. 1436192 EX HAV/DPMT RAMJI SINGH OF 501 FD SVY ENGINEER GP.

1. Having perused the petition alongwith the proceedings of the District Court Martial, I am of the view that whereas the punishment awarded by the District Court Martial is just and fair in itself, however as a consequent effect of reduction to the rank no. 1436192 Spr/DPMT Ramji Singh had to be discharged from service, on becoming a sapper, having completed 19 years of service. The punishment has caused termination of his service, which, in my opinion, has acted harshly towards the career interests of the individual. Having been punished for his offence, he should not suffer unmerited deleterious consequential effect of such punishment.

2. I, therefore, direct that the sentence awarded by District Court Martial be commuted to read:

(a) to be severely reprimanded.

(b) To forfeit seniority of three years for the purposes of promotion.

3. I, recommend that no. 1436192 Ex. Hav/DPMT Ramji Singh be reinstated into service w.e.f. 14 Nov 82, under the provisions of Para 51 (g) and Para 52(b) of the Pay and Allowances Regulations-

Ors (Revised Edition 1979), and his pay and allowances as due, be paid.

Sation:Bareilly
Dated: 02 Mar 83

sd/-
(Rajendra Prakash)
Maj Gen
General Officer Commanding"

4. We have deliberately quoted this order as would be clear in the latter part of our judgment. This order is annexed as Annexure 3 to the writ petition. In pursuance of this order, it seems that the petitioner was reinstated into the service. There is document by way of Annexure 4 which suggests that the note was taken by the Adjutant for the Commanding Officer of Unit Headquarters 501, Field Survey Engineers Group, of reduction of sentence, and thereby the petitioner was reinstated into service w.e.f. 14.11.1982. this date is also significant because it was on that date that the petitioner was taken into custody in pursuance of the earlier order passed by the District Court martial.

5. The petitioner then started serving and he claims that suddenly on 05.06.1983, he was informed that he was retired as a Naik and thereafter he was discharged w.e.f. 08.06.1983 after handing over charge. The petitioner then also received a copy of a entirely different order, wherein his punishment was changed to "(a) to take rank and precedence, as if his appointment as substantive Naik bore date the 01 March, 1983; (b) to be severely reprimanded".

6. Curiously enough, this order is also dated 02.03.1983. The petitioner pleads that the second order dated 02.03.1983 was received by him only on 05.06.1983 and he was not in any manner heard, nor was given an opportunity to represent against this order and was straightway discharged from service. The petitioner, therefore, contends that once final order was passed on 02.03.1983 under section 164 (2) of the Army Act, 1950 and once that order was also implemented and the petitioner was reinstated in pursuance thereto and was also paid his arrears, the subsequent order could not have been passed, much less without giving

opportunity to the petitioner and further the concerned Authority i.e. General Officer Commanding did not have any authority in law to revise his own order and to make it harsher than the one which was already passed and implemented. Our attention was invited by the learned counsel to this second order dated 02.03.1983, which is annexed to this petition as Annexure 5 and in this order also, learned counsel was at pains to point out, that para 1 of the order, which we have quoted, is identically worded. What is different is only para no.2. Para 3 ahs been deleted. The learned counsel, therefore, questions that legality, propriety and the necessity of passing the second order which was harsher in nature, and which had effect of superannuating the petitioner or as the case may be to discharge him from the Army.

7. As against this, what is pleaded by way of counter affidavit is that the petitioner was undoubtedly awarded punishment of District Court Martial. The counter and more particularly para 7 thereof even confirms that the petitioner filed a post confirmation petition under section 164 (2) of the Army Act and vide order dated 02.03.1983, the General Officer Commanding, U.P. Area had commuted the sentence to (a) to be severely reprimanded and (b) to forfeit seniority of three years for the purpose of promotion. It is also accepted that the General Officer Commanding had further recommended the reinstatement of the petitioner into service with effect from 14.11.1982 and this order was received by the concerned Unit on 8.3.1983 and as such in compliance thereto, further orders came to be passed reinstating the petitioner. However, then it is contended in the counter that:

> "but this letter was recalled vide Headquarter Dehradun Area letter no. 120014/589/83 dated 6.4.1983 and fresh orders dated 2.3.1983 (Annexure 5 to the writ petition) were received, and accordingly the Part II Order (Annexure 4 to the writ petition) was cancelled vide Part II Order dated 65/2/83 dated 23.05.1983. In view of this, it is clear that the wrong Part II Order (Annexure 4 to the writ petition) was published reinstating the petitioner. The mistake was detected by the General Officer Commanding, Uttar Pradesh area, and accordingly part II Order dated 23.5.1983 was published."

As if this is not sufficient, in para 15 also the same tune is played. For the sake of convenience, we would quote para 15 of the counter completely as under:

> " that the contents of paragraphs 15 and 16 of the writ petition are incorrect and incomplete, and hence not admitted. In reply it is stated that since the sentence was not formally expressed in para 2 (b) and the recommendations in para 3 of the General officer Commanding, Uttar Pradesh's order dated 2.3.1983(Annexure 3 to the writ petition) were not considered correct, the General Officer Commanding, U.P. Area reviewed his order reconsidering all issues and passed fresh orders (Annexure 5 to the writ petition). Necessary unit Part II order was published cancelling the order, which is appended as Annexure 3 to the writ petition. <u>There was no prohibition to the General Officer Commanding U.P. Area to review its order. The reading of the orders marked as Annexure 3 and 5 to the writ petition will indicate that though the punishment awarded by the District Court Martial was considered just and fair, yet the General Officer Commanding U.P. Area considered that it would act harshly towards the career interest of he individual and in order to help him to earn pension of Naik, the sentence awarded to the petitioner was commuted. The relief so granted to the petitioner was under the provisions of the Army Act Section 179 and there has been no illegality or violation of the principles of natural justice.</u>(emphasis supplied by us).

8. Thus, in short the case of the respondents is that though in pursuance of the petition under section 164 (2) of the Army Act, the concerned authority commuted the sentence by reviewing it to (a) severely reprimanded; and (b) to the loss of three years seniority for the purpose of promotion to begin with by his order dated 02.03.1983, and though this order was implemented and the petitioner was reinstated into service and was also paid his arrears, suddenly it dawned upon the same authority to change his orders to the detriment of the petitioner and then orders were changed resulting in "reduction in rank" of the petitioner to the post of Naik w.e.f. 01.03.1983 and he was severely reprimanded. The respondents made an attempt to justify this sudden change by saying that this order was not passed in violation of powers of the concerned authority, but since the order was wrongly passed and, therefore, it was reviewed and corrected and for doing this there was enough power with the concerned authority.

9. When we see the provision of section 1642(2), we do not see such power of review or as the case may be of suo moto revision on the part of the authority. The sub section (2) merely suggests that if any person considers himself aggrieved by a finding or sentence of any court martial, which has been confirmed, he may present a petition to the Central Government, the Chief of Army Staff or any prescribed officer superior in rank to the one, who confirmed such finding or sentence and the Central Government, the Chief of Army Staff or other officer, as the case may be, may pass such orders as it or he thinks fit. There is thus no express provision in the language of that section for review or revision, which is must for existence of such power. There is no doubt that in pursuance of his petition under section 164(2) of the Army Act, the concerned authority had passed the orders and indeed it is nobody's case that the concerned authority had no powers to pass the orders that were passed on 02.03.1983 (Annexure 3). What is significant is that once it is admitted position that this order was validly passed and implemented also, it dawned upon the concerned authority to revise the said order. We do not anywhere find any power of revision in this section 164(2) or elsewhere in the Act. Learned counsel appearing for the respondents also could not show any such powers to us. Even conceding that power in the authority, what we further fail to understand is that if the said authority wanted to revise the orders or re-call the same, why was it done behind the back of the petitioner. After all, the second order passed was actually not passed on 02.03.1983 at all, though Annexure 5 to the petition, would show that it has been passed on 02.03.1983. This is a clear misconception and clear error. The order Annexure 5 could never have been passed on 02.03.1983 because the concerned authority had already passed the order on 02.03.1983, which order was implemented in its totality. What the concerned officer seems to have done is that he passed fresh order in the back date showing as if the order is passed on 02.03.1983. The learned counsel appearing for the respondents could not explain this apparent anomaly. It is thus clear that the second order was passed somewhere in the month of May of June, 1983 and then it was shown to have been passed on 02.03.1983. This is totally impermissible. Very significantly and strangely, all this was done behind

the back of the petitioner without giving him ghost of opportunity of hearing and without intimating him to this sudden development.

10. What prompted the concerned authority to pass the second order is also not clear because before us the affidavit of that authority is not filed. We do not know and indeed we are at loss to understand as to what prompted the concerned authority to pass the second order back dating it to be of 02.03.1983. We are saying this because para 1 of the earlier order justifying the communication of punishment is identical 'word to word' and 'comma to comma' in the para 1 of the subsequent order also. What is changed is only contents of para 2 containing the punishment awarded. All this is wholly inexplicable and completely unjustifiable. If the concerned authority had felt like changing or recalling the order presuming that under the rules it could don so, it was incumbent upon the concerned authority to send a notice to the petitioner and atleast to hear his side of the story. That would be the ordinary requirement of law of natural justice because the order passed at Annexure 5 was harsher in terms. It should be appreciated that by the first order passed on 02.03.1983, the petitioner who was working as Acting Havaldar was reinstated and was taken back in the service in the same rank. As such, he would have continued to service as Havaldar till he completed 24 years if service. He might even have been able to earn further promotion, which is not before us to consider. However, effect of the order was that the petitioner would have continued as Havaldar till he completed his service as Havaldar. By the second order, the petitioner's service was snapped and he was discharged from the service in the month of June, 1983. If such ghastly consequences were to follow, then it was incumbent upon the concerned authority to give notice to the petitioner and to invite his side of the story against the proposed action to be taken. All that was not done. In our opinion, therefore, the second order dated 02.03.1983 Annexure 5 to the petition must be set aside as this is patently against the law of natural justice.

11. The respondents tried to justify the second order on the ground that the concerned authority has acted under section 179 of the Army Act. We

have seen section, 179 and we are convinced that it has no application as the matter is not in the realm of section 179. The petitioner had filed a petition under section 164(2) of the Army Act. The concerned authority could not, therefore, rely on section 179. This is completely independent power relating to pardon and remission. True it is that under section 179 (c), there was power to commute a punishment. What has happened here is that order commuting the punishment to a particular level has been altered making it harsher. That would not be import of section 179. We do not, therefore, accept the proposition that the concerned authority had power under section 179 or it was justified in passing the order.

12. The petition must, therefore, succeed.

13. The impugned order Annexure 5 to the writ petition is quashed. The petitioner cannot now be reinstated and, therefore, the respondent would now calculate the benefits of the petitioner on the basis of order at Annexure 3 and grant the same within six months from today. We, however, make it clear that since the petitioner did not serve w.e.f. 8.6.1983, he would not be entitled to back salary. He, however, shall be entitled to get all other benefits including the service being counted for the purposes of his pensionary benefits. For calculating the benefits, the authorities are directed to calculate his date of retirement also treating him in the same rank, in which he was serving on the date of discharge.. Petition succeeds on the above lines.

14. In the above circumstances, there will be no order as to costs.

(V.S. Sirpurkar, C.J.)

(P.C. Pant, J.)

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